

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

THE CITY OF HUNTINGTON,

Plaintiff,

v.

CIVIL ACTION NO. 3:17-01362

AMERISOURCEBERGEN DRUG
CORPORATION, et al.,

Defendants.

CABELL COUNTY COMMISSION,

Plaintiff,

v.

CIVIL ACTION NO. 3:17-01665

AMERISOURCEBERGEN DRUG
CORPORATION, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

On October 9, 2020, the court granted defendants' motion to continue the trial in this matter and continued the trial until January 4, 2021. (ECF No. 1093). The reasons for the court's decision follow.

Defendants moved to continue the trial because of the health risks associated with holding a twelve-week trial during the COVID-19 pandemic. In so doing, they pointed to various statistics showing that COVID-19 cases were on the rise in West Virginia, as well as recent guidance from the Centers for Disease

Control (CDC) stating that airborne transmission of the virus was possible. Plaintiffs argued that defendants' statistics were both outdated and misleading.

On March 13, 2020, the President of the United States declared a national emergency under the National Emergencies Act, 50 U.S.C. § 1601 et seq., in light of the COVID-19 pandemic. The impact of the pandemic is well-documented and, in order to lessen the spread of the disease, a number of measures have been instituted in this court over time, including the delay of certain civil and criminal matters. See General Order and General Order # 3 entered in In Re: Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic, No. 2:20-mc-00052 (S.D.W. Va. March 13, 2020 and March 23, 2020) (Johnston, C.J.). On April 14, 2020, the earlier delay of in-person proceedings was extended through May 31, 2020. See General Order # 5 entered in In Re: Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic, No. 2:20-mc-00052 (S.D.W. Va. April 14, 2020) (Johnston, C.J.) (ordering all civil and criminal petit jury selections and trials scheduled to commence from the date of the order through May 31, 2020 continued until further order of the court and that the time period of continuances implemented by the order be excluded under the Speedy Trial Act). On May 22, 2020, civil and criminal petit jury selections and trials scheduled to commence from the date of

the order through June 30, 2020 were continued until further order of the court. See General Order # 6 entered in In Re: Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic, No. 2:20-mc-00052 (S.D.W. Va. May 22, 2020) (Johnston, C.J.).

On June 25, 2020, an order was entered allowing for the resumption of jury trials effective July 1, 2020. See General Order # 7 entered in In Re: Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic, No. 2:20-mc-00052 (S.D.W. Va. June 25, 2020) (Johnston, C.J.). However, on September 18, 2020, due to the increased presence of COVID-19 in the community, all civil and criminal petit jury selections and trials were once again continued until further order of the court. See General Order # 9 entered in In Re: Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic, No. 2:20-mc-00052 (S.D.W. Va. September 18, 2020) (Johnston, C.J.).

While General Order #9 did not directly control whether this bench trial could go forward, the court could not ignore that, as of September 18, 2020, the United States District Court for the Southern District of West Virginia had concluded:

. . . that over the past few weeks, the presence of the virus in the community has increased. According to figures from the West Virginia Department of Health and Human Resources as well as other public health authorities, daily positive case counts have increased significantly, hospitalizations and deaths have

increased, and a majority of the counties that comprise the Southern District of West Virginia are considered to be at a higher risk level for indoor in-person activities.

Id. This bench trial involves a significant number of individuals. As well, counsel and witnesses will be traveling from various parts of the country to West Virginia, further heightening the opportunities for transmission of the virus. The court has a responsibility to proceed in a manner that not only aims to protect the trial participants, but also the other occupants of the courthouse. For all these reasons, the court determined that a continuance of the October 13, 2020, trial date was prudent.

Trial is scheduled to commence on January 4, 2021. A final pretrial conference is hereby **SCHEDULED** for December 8, 2020, at 11:00 a.m., in Charleston. The bench trial and the pretrial conference will be conducted in accordance with accepted safety protocols. Each of the five parties will be permitted to have five individuals present in the courtroom for the trial, for a total of twenty-five lawyers and support personnel at any time. All counsel and trial personnel will be required to wear masks at all times while in the courthouse and while in the courtroom, and observe the social distancing guidelines that are marked in the courtroom and the courthouse itself. A designated safe area will be set aside for witnesses. Each day the respective parties will be required to certify that all individuals who will be present

in the courtroom are symptom-free. Further protocols and adjustments may be made in order to respond to conditions and circumstances that may arise.

These restrictions, including limitations on in-person attendance in the courthouse, are imposed solely to limit the potential spread of and/or exposure to the virus. However, mindful of the presumption of openness that accompanies courtroom proceedings, trial proceedings will be made available electronically so that the respective trial teams, members of the public, members of the press, and other interested parties can observe the proceedings. To make use of this technology, use one of the following methods:

Web browser:

<https://join.uc.uscourts.gov/invited.sf?secret=aBe.nuT4rMl0Gfyale7atQ&id=314041604>

Video system, Jabber or Lync:
wvsdcha5600pub@uc.uscourts.gov

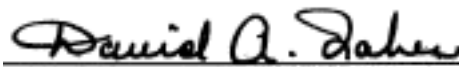
Phone: 5713532300, then enter 314041604

Persons using remote access to proceedings are reminded of the general prohibition against photographing, recording, and rebroadcasting of court proceedings. See Local Rule Civ. P. 83.10. Violation of these prohibitions may result in sanctions, including removal of court issued media credentials, restricted entry to future hearings, denial of entry to future hearings, or any other sanctions deemed necessary by the court.

The Clerk is directed to send copies of this Order to those counsel of record who have registered to receive an electronic NEF.

IT IS SO ORDERED this 19th day of November, 2020.

ENTER:

A handwritten signature in black ink, reading "David A. Faber", is written over a horizontal line.

David A. Faber

Senior United States District Judge